

DEC 27 1993

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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In the Matter of

Amendment of the Commission's Rules To Provide Exclusivity To Qualified Private Paging Systems At 929-930 MHz

PR Docket No. 93-35
RM-7986

To: The Commission

**PETITION FOR RECONSIDERATION AND CLARIFICATION
OF THE
ASSOCIATION FOR PRIVATE CARRIER PAGING SECTION
OF THE
NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO, INC.**

Respectfully Submitted,

ASSOCIATION FOR PRIVATE
CARRIER PAGING, a Section of
NATIONAL ASSOCIATION BUSINESS
AND EDUCATIONAL RADIO, INC.

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SUMMARY

The Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. ("APCP") requests the Federal Communications Commission ("FCC" or "Commission") to reconsider certain aspects of its decision adopted in the Report and Order in this proceeding. For the most part, APCP heartily supports the actions taken by the Commission in the proceeding in adopting an exclusive licensing scheme for local, regional and nationwide private paging ("PCP") systems. APCP believes, however, that the failure of the Commission to provide extended implementation to existing licensees in order to allow a transition period for licensees to meet the newly adopted single transmitter count rules for exclusivity qualification, as well as that in certain respects the mechanisms adopted for the licensing and operation of regional PCP systems will not achieve the Commission's goals for the continued development of high-quality, spectrally efficient private paging operations serving the public's need and demand for such services.

Accordingly, APCP seeks the Commission's reconsideration of its decision and recommends adoption of (1) an extended implementation schedule for all qualified licensees in order to allow existing licensees an orderly transition period to comply with the Commission's multi-frequency transmitter rules for exclusivity qualifications; and (2) a scheme of statewide

licensing of regional systems so that state boundaries would, in most circumstances, define the geographic limits of regional systems, rather than the contours of transmitters within the systems; and (3) a rule permitting operation at a maximum effective radiated power of 3500 watts within those regions, provided that adjacent co-channel paging systems remain protected.

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AND EDUCATIONAL RADIO, INC.

The Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. ("APCP"), pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. Section 1.429, hereby respectfully submits a Petition for Reconsideration of the Commission's Report and Order, 58 Fed. Reg. 62289 (November 26, 1993) ("Order"), in the above-captioned proceeding.

I. INTRODUCTION

In this proceeding, the Commission has modified its rules governing the licensing of private carrier paging ("PCP")

systems operating at 929-930 MHz. Specifically, it adopted a system of exclusive licensing of local, regional and nationwide PCP systems on 35 of the 40 PCP channels and defined the prerequisites for such exclusivity. In addition, it established construction periods and technical and operational standards for exclusively-licensed PCP systems. Finally, it provided for grandfathering of all existing systems and for granting immediate exclusivity to existing systems that meet the new exclusivity criteria.

APCP heartily supports the Commission's exclusivity decision and fully concurs in the reasons cited for its adoption. Recognizing the increasing level of maturity of the private paging industry, the Commission has responded effectively by adopting licensing procedures to ensure the growth of high quality, spectrally efficient private paging operations that are able to optimally serve the public's need and its demand for those services well into the future. APCP strongly agrees that the move to exclusive licensing of local, regional and nationwide PCP systems will create the stable, predictable environment necessary for the industry to continue to attract investment and thereby to expand service in ways the public finds most desirable. APCP believes that certain details in the implementation process should, however, be revisited and

therefore respectfully seeks reconsideration of the Order in the manner and to the extent set forth herein. In particular, it recommends the adoption of

- an extended implementation schedule for all qualified licensees in order to allow existing licensees an orderly transition period to comply with the Commission's newly adopted multi-frequency transmitter rules; and
- statewide licensing of regional systems wherein state boundaries would define the geographic limits of regional systems, rather than the contours of transmitters within the systems; and
- a rule permitting operation at a maximum effective radiated power ("ERP") of 3500 watts within those regions, along with appropriate provisions to prevent encroachment of systems into co-channel operations in adjacent states.

II. DISCUSSION

A. **The Commission Should Provide For An Extended Implementation Schedule For Existing Licensees As Well As New Applicants.**

In its Report and Order, the Commission adopted in Section 90.496, an extended implementation schedule for applications filed with the Commission after October 14, 1993 (emphasis added). The sole rationale for limiting extended implementation only to applications filed after October 14, 1993 and not to existing licensees was the conclusionary statement set forth in Footnote 43 in which the Commission stated that "[t]he slow growth option will be limited to new applications only. We

will not grant requests to extend the construction period for grandfathered licenses".

The original Petition for Rule Making (RM-7986) submitted by APCP, as well as the Commission's Notice of Proposed Rule Making, FCC 93-101, released March 31, 1993 ("NPRM"), did not limit the extended implementation rules to new applicants.¹ On the contrary, APCP's original proposal required that an applicant request at least thirty (30) or more transmitters to qualify as well as a requirement that the transmitters constructed meet bona fide operational parameters. Section 90.496 of the Rules as proposed in the NPRM contained no limitation on applicability to existing licensees. Rather, the Commission acknowledged APCP's original proposal and in the NPRM asked for comment on whether performance bonds should also be required as an additional condition for slow-growth applicants.²

The Commission in this proceeding has, for the first time, addressed the issue of the industry wide use of multi-frequency transmitters or frequency agile transmitters. In this respect, it is a common industry practice for carriers to enter into inter-carrier agreements in order to allow the offering of

¹ See NPRM, Paragraph 30; Section 90.496

² See NPRM, Paragraph 30, Footnote 47

expanded coverage to customers on each licensee's system. In the Report and Order, the Commission has required that in order to qualify for exclusivity, a transmitter be counted on only one of its operating frequencies.³ That is, although a PCP's system may qualify for construction purposes utilizing frequency agile transmitters, for purposes of counting for exclusivity qualification, the operator must meet the single transmitter count requirement.

The single transmitter rule for purposes of qualification for exclusivity as finally adopted in the Report and Order was not clearly set forth in the NPRM. In this regard, with few exceptions,⁴ the majority of interested parties commenting on this issue supported the continued use of multi-frequency transmitters for purposes of qualifying for exclusivity.⁵ Notwithstanding such support, the Commission has now implemented a new rule which when applied to constructed and operating systems requires an orderly transition period for existing licensees to come into compliance without placing at

³ Report and Order, Paragraphs 16 and 17

⁴ See Comments of PageMart.

⁵ See, e.g., Comments of PacTel Paging

risk their rights to qualify for exclusivity and to continue to serve their customers. So long as the Commission recognizes the need for a transition period to allow existing licensees to replace already operating multi-frequency transmitter systems serving more than one frequency with additional or replacement transmitters dedicated for exclusivity purposes to a single system in order to continue to satisfy the Commission's transmitter exclusivity requirements, the consensus of the APCP section is to support the Commission's single transmitter count rule for exclusivity qualification. It is, however, the impact of this rule change coupled with the failure of the Commission to allow existing licensees to seek an extended implementation schedule which creates an unfair and unrealistic result to licensees, is contrary to the principals of proper administrative rule making and which if not reconsidered and corrected will be contrary to the public interest.

The Commission's decision not to provide for a period of extended implementation to existing licensees is contrary to the record established in this proceeding. Such a decision failed to provide adequate and reasonable notice to interested parties of the ultimate rule change adopted and thereby raises serious questions as to its validity. More importantly, such a rule has a severe and detrimental impact on existing carriers

currently operating systems and on the customers which they serve. Without the ability to transition from the use of multi-frequency transmitters to single transmitters in an orderly fashion, a carrier is faced with the artificial requirement to reconstruct transmitters in a period of time which is unrealistic, uneconomical and detrimental to maintaining competitive operating systems offering paging services to the public at competitive prices. A requirement that existing carriers are not allowed extended implementation for construction but must be fully constructed on a single transmitter count basis within eight (8) months after certification of exclusivity by the Commission,⁶ will only result in a flood gate of pressure by a

⁶ There is a need for the Commission to clarify when the eight (8) month construction requirement must be met by grandfathered systems in order to come into compliance with the dedicated transmitter rule. The initial request to NABER may include both pending and unconstructed stations (provided that they have met the FCC's application cut-off date of October 14, 1993). In this respect, because the Commission's application clarification and the construction process is dynamic, the facilities placed in operation for final construction qualification purposes may vary from the initial licenses designated. Accordingly, a single designated outside construction date is required. This type of administrative process would take into account the need for applicants to be able to modify their initial sites as the details of site availability and system operations are finalized without impacting the eight (8) month licensing determination date. Further, an outside date certain for existing systems would remove the confusion which would be caused as some applications are held at Gettysburg and delayed either due to normal processing delays, ASB problems or other technical review considerations. Accordingly, NABER believes that the Private Radio Bureau should clarify this administrative detail by requiring the licensee

majority of the carriers to order transmitters at the same time from manufacturers, as well as the simultaneous need to secure site managers and technicians to reconstruct their systems within an artificially compressed period of time. To the extent the manufactures are unable to deliver equipment in a timely fashion, or to the extent sites are not available or to the extent operators are forced to purchase and expend funds without the ability to budget and transition their already operating systems in an orderly fashion, does not serve the public interest. Such a requirement will only create the needless expenditure of funds, time and energy within an unrealistic time period and which may only need to be redone at a later date.⁷ More importantly,

(unless a separate rule waiver request or extended implementation showing has been made pursuant to Section 90.496 of the Rules) to meet the dedicated transmitter requirements no later than eight (8) months following the date of the Commission's grant of determination of exclusivity. Such a date could be established either by issuance of a Public Notice of the exclusivity grant to a particular licensee or by a separate notification sent to such licensee. Such a clarification is administrative in nature so as to allow the orderly processing by the Commission of license applications and accordingly can be made by administrative or public notice issued by the Private Radio Bureau.

⁷ The Commission should contrast its construction requirements adopted in the 220 MHz proceeding for nationwide licensees who were given up to four (4) years to construct just forty percent (40%) (28 sites in total) of their nationwide system with the eight (8) month period placed upon already existing and operating nationwide licensees to construct on a single transmitter count basis all of their three hundred (300) minimum sites in order to qualify for exclusivity.

service on existing systems is already being provided to hundreds of thousands of customers who should not be disturbed by the Commission's decision to adopt a new rule without a reasonable transition period. Accordingly, it is necessary for the Commission to implement a transition rule to allow those systems already licensed to build out their systems on a single transmitter basis in order to continue to qualify for exclusivity.

Applying the extended implementation rule to existing licensees will not result in any increased speculation or the hoarding of frequencies. Rather, contrary to any such conclusion, existing licensees have already expended or committed to expend millions of dollars on their systems and on the whole have been in operation serving a wide segment of the public over both regional and nationwide areas of operation. Use of multi-frequency transmitters is a common and accepted industry practice. To the extent the Commission has further concerns as to the good faith intentions of an operator, such licensees are prepared, if necessary, to put up a bond or post an escrow with the Commission to demonstrate their continued ability to bring into compliance the build-out of their systems. Those carriers who are already operating on a regional and/or national basis,

have clearly demonstrated the commitment to provide service to the public and not to hoard or speculate in frequencies. The Commission's final protection against any speculation concern is the requirement that existing licensees requesting a transition period to come into compliance with the Commission's single transmitter count rules for exclusivity provide a showing with the Commission setting forth the reasons for the extension requested.

Accordingly, the APCP Section of NABER is in strong disagreement with the Commission's failure to fashion a transition period for existing licensees currently constructed and operating using multi-frequency transmitters who must now meet the Commission's newly adopted dedicated transmitter count rule in order to qualify for exclusivity. In this regard, APCP believes that the extended implementation rules adopted in Section 90.496 be reconsidered and changed so that they include existing licensees and are not limited only to applications filed after October 14, 1993.

B. The Geographic Limits of Regional PCP Systems Should Be Defined by State Borders Rather Than by the Location of Individual Transmitter Sites.

Newly-adopted rule Section 90.495(a)(2) provides that a regional system, in order to qualify for exclusivity, must

consist of at least 70 transmitters, located in a maximum of 12 adjacent states. It further provides that in each of the top 30 markets listed in Section 90.741, no transmitter may be counted toward the required 70 unless it complies with the requirements for local system exclusivity, i.e., 18 transmitters per market in the top three markets, 6 transmitters per market in markets four through 30. Section 90.495 further states that no co-channel station will be licensed within certain prescribed distances of any transmitter comprising part of a "qualified" regional system.⁸ Thus the rule implements a "contour protection" scheme to govern licensing and expansion of regional PCP systems. APCP believes that such a "contour protection" approach, in the context of regional PCP systems, is undesirable. APCP therefore urges the Commission to reconsider that aspect of its decision and to adopt instead a rule that defines the limits of regional systems along the geographic borders of the states that comprise those systems. In short, APCP recommends exclusive licensing of qualified regional systems on a statewide, rather than a local area basis.

⁸ The prescribed separation distances range from 70 to 116 miles, depending on the class of the PCP station as defined in Section 90.495(b)(1).

1. Statewide Licensing of Regional Systems is Consistent With the Commission's Policies and Objectives in this Proceeding.

In both its Notice of Proposed Rule Making, FCC 93-101, released March 31, 1993 ("NPRM") and the Order, the Commission has concluded that exclusive licensing of qualified PCP systems will "create a more stable, predictable environment for licensees." NPRM at ¶ 16; Order at ¶3. Such an environment, it noted, will promote optimal efficiency, quality of service and "encourage investment in wide-area, high-capacity paging systems in the 929-930 MHz band." Order at ¶6. APCP concurs in these objectives and has supported them throughout this proceeding. APCP Petition for Rule Making, RM-7986, at 7; APCP Comments at 16.

The public interest is best served when paging providers have the incentive and are able to design and operate their systems in ways that meet their subscribers' demands for paging services "where they live." In an increasingly mobile world, paging customers have consistently sought seamless service in ever-larger geographic areas, in addition to local-area coverage. Recognizing this modern reality, the Commission reiterates repeatedly throughout the Order the virtues of wide-area coverage and the need to create an environment that

encourages licensees to expand their coverage. Order at ¶¶ 15 & 33.

Statewide licensing of regional PCP systems will advance each of the objectives the Commission seeks to achieve. Defining the geographic limits of regional systems along state lines will create the stable, predictable environment the Commission supports by establishing defined areas within which licensees will have the exclusive right to provide service. It will eliminate any opportunity for the filing of applications designed more to limit the expansion of another's regional system than to offer efficient service in the first instance. Better able to follow the demand of subscribers into new geographical areas, licensee will be less driven to expand prematurely into new areas solely to ensure that such areas are not first appropriated by others' strategic filings. Enhancing licensees' opportunity for planned expansion of regional systems reduces unnecessary infrastructure costs, thereby reducing rates charged to subscribers.

Just as nationwide exclusivity promotes and ensures future expansion of coverage by nationwide licensees, statewide regional exclusivity, as proposed below, will provide licensees with an incentive to expand services throughout the state. As a result, the public will be better and sooner served than by the

more piecemeal approach of using mileage separation and contour protection methods. APCP believes that implementation of statewide licensing is mandatory if truly regional systems are to be achieved under the Commission's exclusive licensing scheme. The systems that will otherwise result will amount to an amalgam of local-area systems, rather than the efficient, high-capacity wide-area regional systems that the public seeks and the industry and the Commission mutually desire to promote.

2. An Exclusive Statewide Licensing Scheme for Regional Paging Systems Must Meet All the Basic Requirements Adopted by the Commission for Qualified Systems.

APCP believes that the regional exclusivity criteria contained in Section 90.495 are proper and must be retained in the revised statewide licensing rule which it proposes herein. It supports the requirement that applicants for regional systems must propose a minimum of 70 transmitters, that the region be limited to a maximum of 12 contiguous states, and that criteria for local system exclusivity be met as to any transmitters located in the top 30 markets. APCP agrees that these basic requirements will foster the development of regional systems and enhance geographic coverage and quality of service within those regions.

APCP recommends, in addition to the above criteria, that the Commission grant exclusive licenses extending to the borders of any state in which the applicant proposes to construct at least one transmitter, except that in states having markets listed among the top 30, the applicant must construct the required 6-18 contiguous transmitters in order to obtain exclusivity in that state.⁹

Finally, as part of a statewide licensing scheme, APCP recommends that the Commission permit transmitters to be located anywhere within the region so long as the mileage separations prescribed in Section 90.495(b)(2) are maintained as to any existing facility in an adjoining region. This approach will ensure service in all areas by at least one service provider. Otherwise, common state borders between co-channel regional systems could become artificial "dead zones" despite a present demand for service and the existence of a carrier ready and able to offer the needed service. In short, such a plan combines the advantages of statewide licensing of regional systems as described herein, utilizing the Commission's "contour protection"

⁹ Markets listed among the top 30 in the nation are located in 21 states and the District of Columbia. Thus, an applicant seeking to obtain regional exclusivity in any of those 21 states would be required to construct at least 6-18 transmitters within that state.

approach to guide licensing decisions along the common state borders of co-channel systems.

3. Statewide Licensing of Regional Systems Will Ensure Rapid Expansion of Service Throughout Well-Defined Geographic Areas and is Consistent with the Structure of Nationwide Exclusivity.

Statewide regional licensing mirrors the Commission's approach to nationwide exclusivity, only on a more limited scale. It offers like kind advantages and conforms structurally with the mechanisms adopted in the nationwide context to assure geographic distribution of service.

Beginning with the premise of a 12-state maximum for regional systems, the new rules establish a framework for regional systems that is essentially one quarter the size of a nationwide system. The requirement for 70 transmitters is likewise approximately one fourth the nationwide requirement for 300 transmitters. As herein proposed by APCP, the prerequisite that there be a minimum of one transmitter per state (in 21 states and D.C., a minimum of 6-18 transmitters) is commensurate with the nationwide condition that licensees serve a minimum of two markets within each RBOC region. Both approaches assure that significant population centers within the exclusively licensed geographic areas, whether regional or national, will be served.

Building on the basic requirements for regional exclusivity as adopted by the Commission, and applying the same policies and mechanisms used by the Commission to achieve its objectives of efficient, high-quality, nationwide paging systems, APCP recommends the adoption of statewide regional licensing. The creation of a stable, predictable environment for the growth of paging systems is no less essential in the regional context than at the nationwide level. Statewide licensing is needed for that environment to develop and be preserved.

C. Operation With a Maximum Effective Radiated Power of 3500 Watts Should be Permitted Within Regional Paging Systems, Provided That Adjacent Co-Channel Systems Remain Protected.

The rules adopted in this proceeding provide for operation by nationwide licensees with up to a maximum of 3500 watts ERP. With respect to regional systems, however, the Commission expressed concern that the higher power operations would limit the opportunity for entry by new systems into the market. APCP submits that in the context of statewide regional licensing, as proposed herein, this result will not pertain.

A key advantage to statewide licensing is the fact that regional systems have logical, well-delineated, easily-defined borders. The opportunity for new entrants is not reduced through utilization of a statewide licensing scheme; the geographic area

within which licensed systems operate is simply more clearly outlined. In reality, the very nature of a regional system necessitates broad territorial coverage to assure subscribers maximum mobility and continued coverage by a single service provider. Unlike local systems, regional systems are not susceptible to being "squeezed in" to operate in an unserved "white area."¹⁰

Within the boundaries of a regional system, the use of higher power transmitters will enable licensees to offer superior service at a lower cost. As has been previously noted by commenters in this proceeding, by increasing the reliable service area of each station within the system, the number of stations needed to provide optimal service is reduced, the cost of the paging infrastructure is lowered, and thereby the cost of service to the public. American Paging Comments at 9-10; Celpage Comments at 11-12; PacTel Paging Comments at 17-18; PageNet Comments at 15-17. As the Commission observed in the Order, the significant growth of the paging industry has been characterized

¹⁰ Indeed, one of the advantages of statewide licensing is to assure that regional systems are able to expand logically throughout a state as the demand for service requires. Licensees ought not be constrained to choose between premature expansion and the risk of having to expand by acquisition of a newly-licensed local or so-called regional system that is established in the expansion path of the regional operator. See discussion at Section I.A.1. (p.5), above.

by the development of systems covering ever larger areas, and the rules adopted in this proceeding seek to encourage the development of such systems. Order at ¶ 33. Operation with 3500 watts within regional systems is consistent with that objective and will better serve the public.

Higher powered operations by regional licensees must not, however, be allowed to encroach on the operational areas of adjoining systems. Therefore, it is proposed that along state borders which form the boundaries of regional systems, no transmitter be authorized that does not comply with the minimum mileage separation requirements of Section 90.495(b)(2) as to any co-channel station licensed to another carrier. This approach strikes a proper balance between the efficiency advantages of high powered operations, and the need to protect systems licensed in adjacent states, whether they are regional or local area systems.

III. CONCLUSION

The Commission's new rules governing the licensing of private paging systems will in most regards operate to achieve the aims and objectives which both the agency and the private paging industry have sought in this proceeding. APCP believes

that by modifying those rules to provide for an extended implementation schedule for existing licensees as well as new applicants, to provide for exclusive licensing of regional systems on a statewide basis and permitting operation of stations associated with such regional systems at a maximum ERP of 3500 watts, the Commission will better assure that its goals are attained. For the reasons set forth above, APCP therefore respectfully requests that the Commission reconsider and clarify its Report and Order in the manner described herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Teresa L. Lockwood, hereby certify that I have on this 27th day of December, 1993, sent via U.S. First Class Mail, postage prepaid, or Hand Delivery, a copy of the foregoing **Petition for Reconsideration and Clarification of the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc.**, PR Docket No. 93-35, RM-7986, filed this date with the Acting Secretary, Federal Communications Commission, to the persons listed on the attached service list.


Teresa L. Lockwood